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United States General Accounting Office
Washington, DC 20548

June 13, 2003

The Honorable Tom Davis
Chairman
The Honorable Henry Waxman
Ranking Minority Member
Committee on Government Reform
House of Representatives

Subject: *Contract Management: Comments on Selected Provisions of the Services Acquisition Reform Act of 2003, H.R. 1837*

This is a follow up to our April 30, 2003, testimony¹ on the proposed Services Acquisition Reform Act of 2003 (SARA). Because our testimony was based on a section-by-section analysis of the proposed legislation, the Committee requested that we review the specific provisions of the bill as introduced and provide any additional comments. The enclosure summarizes our comments on the sections covered in our testimony, and contains our comments on other selected provisions of SARA to which our past or ongoing work may be relevant.

We conducted this analysis in May 2003 in accordance with generally accepted government auditing standards. If there are any questions concerning this letter, please call me at (202)-512-8214. The principal contributors to this analysis include Blake Ainsworth, Christina Cromley, Paul Greeley, and Karen Sloan.

We will make copies of this letter to others upon request. In addition, this letter will be available at no charge on the GAO Web site at <http://www.gao.gov>.

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¹ *Contract Management: Comments on Proposed Services Acquisition Reform Act*, [GAO-03-716T](#) (Washington, D.C.: April 30, 2003)

Enclosure

Comments on Selected Provisions of the Services Acquisition Reform Act of 2003, H.R. 1837

Section 101 - Definition of Acquisition

This section would provide a broad, governmentwide definition of the term “acquisition.” We support the definition because it recognizes that acquisition is more than just awarding contracts. Acquisition includes development of requirements, solicitation and selection of sources, contract performance, and the management and measurement of performance through final delivery and payment.

Section 102 - Acquisition Workforce Training Fund

This section would establish, within the General Services Administration (GSA), an acquisition workforce training fund, which would be managed by the Federal Acquisition Institute. The fund is to be financed by depositing five percent of the fees collected by various executive agencies under their governmentwide task and delivery order contracts as well as under GSA’s schedule contracts.

Acquisition workforce training is critical, and we recognize the need for adequate funds for this training. However, we believe the procuring agencies should ensure that adequate funding for training is available through the normal budgeting process. We are concerned about relying on contract program fees—which are intended to cover other requirements and which can vary from year to year—as a source of funding for such an important priority as acquisition workforce training.

Section 103 - Government-Industry Exchange Program

This section would establish a program to permit the temporary exchange of high-performing acquisition professionals between the federal government and participating private-sector concerns.

Comptroller General David Walker has strongly supported the concept of exchange programs. Specifically, in July 2001,¹ he recommended that the Congress explore greater flexibilities to allow federal agencies to enhance their skills mix by leveraging the expertise of private sector employees through innovative fellowship programs.

¹ *Human Capital: Building the Information Technology Workforce to Achieve Results*, [GAO-01-1007T](#) (Washington, D.C.: July 31, 2001).

The exchange program proposed in SARA—which is modeled after the Information Technology Exchange Program included in the recently passed E-Government Act of 2002²—could enhance the ability of federal workers to successfully transform the way the federal government acquires services. We support this provision.

Section 201 - Chief Acquisition Officers

This section would create a Chief Acquisition Officer within each civilian executive agency. Our discussions with officials from leading companies, indicate that a procurement executive, or Chief Acquisition Officer, plays a critical role in changing an organization's culture and practices.³ Section 201 of SARA provides the Chief Acquisition Officer with clear lines of authority, accountability, and responsibility for acquisition decision-making. We support this provision.

Section 211 - Ensuring Efficient Payment

This section would provide for a streamlined payment process under which service contractors could submit invoices for payment on a biweekly or a monthly basis. Biweekly invoices would be required to be submitted electronically.

Implementation of this provision could increase the number of improper payments made and further stress weak systems and related internal controls. Agency efforts to address improper payment problems have been hampered by high payment volume, inadequate payment systems and processes, internal control weaknesses, and downsizing in the acquisition and financial management community. Until federal agencies make significant progress in eliminating their payment problems, any requirement to accelerate service contract payments would likely increase the risk of payment errors, backlogs, and late payment interest.

Section 212 - Extension of Authority to Carry Out Franchise Fund Programs

This section would reauthorize the government's franchise funds until October 1, 2006. At the request of the Chairman of the Committee, the General Accounting Office (GAO) has initiated a review of these franchise fund programs.

Section 213 - Agency Acquisition Protests

This section would provide for agency-level protests of acquisition decisions alleged to violate law or regulation. An agency would have 20 working days to issue a decision on a protest, during which time the agency generally would be barred from awarding a contract or continuing with performance if a contract already had been awarded. If an agency-level protest were denied, a subsequent protest to GAO that

² Public Law 107-347, section 209.

³ *Best Practices: Taking a Strategic Approach Could Improve DOD's Acquisition of Services*, GAO-02-230 (Washington, D.C.: Jan. 18, 2002).

raised the same grounds and was filed within 5 days would trigger a further suspension of award or performance pending resolution of that protest.

We believe that a protest process that is effective, expeditious, and independent serves the interests of all those involved in or affected by the procurement system. This section appears to address each of these criteria. First, this section would provide for a more effective agency-level protest process by requiring that an agency suspend, or “stay,” the procurement until the agency protest is resolved. Although the Federal Acquisition Regulation (FAR) currently provides for agency protests and includes similar stay provisions, continuation of the FAR stay through a subsequent GAO protest is left to agency discretion. The provisions of this section would eliminate this discretion by providing for an additional stay for protests filed at GAO within 5 days of decisions on protests at the agency level.

Second, the process would be relatively expeditious because decisions would be required within 20 working days. We are concerned, however, that 20 working days might not be adequate for a thorough review, particularly in complex procurements.

Finally, requiring protests to be decided by the head of the agency may help to mitigate longstanding concerns about a perceived lack of independence when decisions on agency-level protests are issued by officials closely connected with the decision being protested. The mitigation potential could be affected, however, by delegation of decision authority to lower levels within the agency.

Section 301 - Share-in-Savings Initiatives

Share-in-savings contracting, with an opportunity to participate in a project’s monetary benefits, can motivate contractors to generate savings and revenues for their clients. We have found few documented examples of share-in-savings contracting in the federal government. Officials in federal agencies we spoke with noted that such arrangements might be difficult to pursue given potential resistance and the lack of good baseline performance data. Department of Energy officials have told us that they believe such contracts can be best used when federal funding is unavailable.⁴

We issued a report earlier this year in response to your request that we determine how the commercial sector uses share-in-savings contracting.⁵ The companies in our study found that successful arrangements have generated savings and revenues. In one case highlighted in our report, \$980,000 was realized in annual energy savings.

To achieve the potential benefits from the use of share-in-savings contracting, it may be worthwhile to examine ways to overcome potential issues. For example, in a letter

⁴ *Energy Conservation: Contractor’s Efforts at Federally Owned Sites*, [GAO/RCED-94-96](#) (Washington, D.C.: Apr. 29, 1994).

⁵ *Contract Management: Commercial Use of Share-in-Savings Contracting*, [GAO-03-327](#) (Washington, D.C.: Jan. 31, 2003).

to the Office of Federal Procurement Policy (OFPP) in March of this year,⁶ we pointed out that share-in-savings contracting represents a significant change in the way the federal government acquires services. To address this challenge, we underscored the need for the OFPP to develop guidance and policies that could ensure that members of the federal acquisition workforce understand and appropriately apply this new authority. Further, agencies would need to consider the extent to which they can achieve comparable savings through in-house efforts or traditional contracting approaches.

Section 401 - Additional Incentive for Use of Performance-Based Contracting for Services

This section authorizes agencies to treat a contract or task order as being for a commercial item if it is performance-based—that is, it describes each task in measurable, mission-related terms, and identifies the specific outputs—and the contractor provides similar services and terms to the public. This section also establishes a center of excellence that would help federal agencies learn about successful ways to implement performance-based contracting.

In our September 2002 report,⁷ we recommended that the OFPP Administrator clarify existing guidance to ensure that performance-based contracting is appropriately used, particularly when acquiring more unique and complex services that require strong government oversight. If this section is enacted, we believe that clear guidance will be needed to ensure effective implementation.

In a May 22, 2003, letter⁸ to congressional committees, we reported on DOD's implementation of temporary authority⁹ to treat certain performance-based service contracts as contracts for commercial items. DOD issued regulations to implement the legislative authority, but because there is no tracking mechanism, DOD does not know the extent to which the authority has been used. DOD officials believe, however, that use of the authority has been limited, at best. In our view, agencies need to track these contracts so the implementation of this tool for promoting greater use of performance-based contracting can be evaluated.¹⁰

⁶ *Contract Management: OFPP Policy Regarding Share-in-Savings Contracting Pursuant to the E-Government Act of 2002*, GAO-03-552R (Washington, D.C.: Mar. 24, 2003).

⁷ *Contract Management: Guidance Needed for Using Performance-Based Service Contracting*, GAO-02-1049 (Washington, D.C.: Sept., 23, 2002).

⁸ *Use of Legislative Incentive for Performance-Based Contracting Unknown*, GAO-03-674R (Washington D.C.: May 22, 2003).

⁹ Section 821(b) of the Defense Authorization Act for Fiscal Year 2001, Pub. Law 106-398, Oct. 30, 2000.

¹⁰ In this regard, section 1441 of H.R. 1588, the Defense Authorization Act for fiscal year 2004, which has passed the House and which contains most of the provisions of SARA as originally introduced, would require agencies to collect data on the use of this provision.

Section 402 - Authorization of Additional Commercial Contract Types

This section would provide for a change to the FAR to permit the use of time-and-materials and labor-hour contracts for commercial services commonly sold to the general public. This change would make it clear that such contracts are specifically authorized for commercial services.

According to the FAR, a time-and-materials contract may be used only when it is not possible to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. Further, it states that a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used. The FAR also requires that a time-and-materials contract contain a ceiling price. Because of the enhanced level of surveillance required, agencies facing acquisition workforce shortages need to consider carefully whether they have sufficient resources to properly oversee time-and-materials contracts.

Section 404 - Designation of Commercial Business Entities

This section would designate as a commercial item any product or service sold by a company that over the past 3 business years made 90 percent of its sales (in dollars) to private sector entities. We are concerned that this provision would allow for products or services that had never been sold or offered for sale in the commercial marketplace, regardless of amount, to be considered a commercial item. In such cases, the government may not be able to rely on the commercial marketplace to gauge the quality and pricing of the product or service. If this provision is approved, consideration should be given to establishing a dollar limit on products or services deemed to be commercial items under this provision.

Section 501 - Authority to Enter into Certain Procurement-Related Transactions and to Carry Out Certain Prototype Projects

This section would authorize those civilian agencies approved by OMB to use so-called "other transactions" for projects related to defense against or recovery from terrorism, or nuclear, biological, chemical, or radiological attacks. Other transactions are agreements that are not contracts, grants, or cooperative agreements. This authority would be similar to that currently available to the Departments of Homeland Security and Defense.

Because statutes that apply only to procurement contracts do not apply to other transactions, this authority may be useful to agencies in attracting firms that traditionally decline to do business with the government. In fact, our work shows that DOD has had some success in using other transactions to attract nontraditional firms to do business with the government. However, our work also has shown that there is a critical need for guidance on when and how other transactions may best be used.

The guidance developed by DOD may prove helpful to other agencies should the Congress decide to expand the availability of other transaction authority.

Section 503 - Authority to Make Inflation Adjustments to Simplified Acquisition Threshold

This section would permit the Administrator for Federal Procurement Policy to adjust the simplified acquisition threshold as defined in the Office of Federal Procurement Policy Act¹¹ every 5 years to an amount equal to \$100,000 in constant fiscal year 2003 dollars (rounded to the nearest \$10,000).

The inflation adjustment in this section would maintain the value of the simplified acquisition threshold established by the Congress. It is similar to the periodic inflation adjustment provision applicable to thresholds for cost or pricing data requirements in the Truth in Negotiations Act.¹² We support this provision.

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¹¹ 41 U.S.C. 403

¹² 10 U.S.C. 2306a